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Leslie Price and Lafe Morley v. Ashby's Inc. and General Motors Co., Pontiac Div. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

LESLIE PRICE and LAFE MORLEY,
Plaintiffs and Appellants,

—vs.—

ASHBY'S INCORPORATED, a Utah corporation, and GENERAL MOTORS CORPORATION, PONTIAC DIV.,
Defendants and Respondents.

Case No.
9165

BRIEF OF RESPONDENT GENERAL MOTORS CORPORATION

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INTRODUCTORY STATEMENT

Plaintiffs' Statement of Facts is incomplete and frequently misleading, makes assertions which are unsupported by the record and includes material not admitted in evidence. Therefore, Defendant General Motors Corporation makes the following Statement of Facts. The parties will be designated as they appeared in the trial court.

STATEMENT OF FACTS

This case arose out of an automobile accident which occurred April 28, 1958, at about 11:30 p.m. on Highway 6-50, approximately two miles south of Delta, Utah. The automobile in which Plaintiffs were riding failed to negotiate a turn, left the highway and turned over. Plaintiffs brought suit for damages allegedly suffered as a result. Trial was held October 6, 1959 in the District Court of Salt Lake County before Aldon J. Anderson, District Judge, and at the close of Plaintiffs' evidence a Motion to Dismiss was granted as to each Defendant. Plaintiffs have appealed from the Order of Dismissal.

Plaintiff Leslie Price purchased a Pontiac automobile on February 14, 1958, from Defendant Ashby's Incorporated at Delta, Utah. The air suspension system functioned normally through the first 2,000 miles of the automobile's operation. (R. 34). Sometime later Price observed that after the engine had been stopped for a considerable period of time, he would find the automobile's right front near the ground. (R. 80). Some settling of the body was anticipated in the Owner's Instruction Manual and the owner was instructed to start the car engine to rectify this. (R. 14, Ex. P-1). After the engine on Price's car had been started, the car would return to its normal level in approximately

twenty seconds (R. 81) and while it was being driven there was no difficulty with the level or suspension of the body. (R. 81). Price took the automobile to Defendant Ashby's four times to have the air suspension system adjusted. (R. 80). After these adjustments the right front continued to settle after the engine had been stopped for a considerable period of time. (R. 67, 80).

Plaintiff Lafe Morley, a real estate salesman, visited Price in Delta on April 28, 1958. Price and Morley left Delta in Price's Pontiac at about 4:30 p.m. and drove to Garrison, Utah, about eighty miles from Delta. At Garrison they looked over a ranch which Morley was attempting to sell to Price (R. 40, 41), and then went to Baker, Nevada, where they had sandwiches and two Coke highballs. (R. 44, 133). About 9:00 p.m. they started driving back to Delta. (R. 46).

At a point about two miles south of Delta they failed to negotiate a curve to the left and the car rolled over. (R. 47). The only evidence of what caused the car to leave the road is the testimony of Plaintiffs. Price testified:

> "A. When we was making that turn, it happened so quick, it is kind of hard to explain. It seemed like the car stepped up, and was off and over." (R. 46).

Morley testified:

"A. I noticed we was getting close to home and all at once we just went upside down. I had time to say, 'Oh, my God, Les', that is all I got time to say.

Q. Mr. Morley, did you observe the way the automobile moved?

A. There wasn't time enough. It was so fast I didn't observe a thing. It just started going over and we was upside down and was out." (R. 136, 137).

Morley said this was the only observation he made about the accident prior to its happening. (R. 155). Neither Plaintiff recalled anything unusual about the automobile before the accident, Price stating:

"Q. Do you recall immediately before the car going off the highway that the car was being rough riding?

A. No I didn't." (R. 76).

On this point Morley said:

"Q. Did you notice anything of an unusual nature about the automobile, or how it operated?

A. Not a thing." (R. 134).

Price testified that when he left Delta on the day of the accident the level of the car was proper and remained so until after the accident. (R. 82).

Plaintiffs' Statement of Facts asserts that the steering wheel froze in Price's hand. (Brief of Appellant, p. 2). There is no reference to the record to support this assertion for the obvious reason that there was no such evidence. The same is true of the assertion that the car swayed prior to the accident.

The day after the accident, Plaintiffs returned to the scene looking for Morley's glasses. (R. 51). Price observed the scene at that time and stated:

> "A. Just as we come around the bend there, I could see brake marks on the oil and the car just went straight and down over the shoulder." (R. 51).

Price saw only the brake marks on the highway and did not see any gouges in the road. (R. 75). Morley said the only mark he observed at the scene was a scuff mark which was not on the roadway at all. His testimony was:

> "Q. Now, this scuff mark that you testified to, that scuff mark was off to the shoulder of the road, wasn't it?
>
> A. Yes sir, it was in the dirt.
>
> Q. It wasn't in the oil surface of the road?
>
> A. That is right." (R. 151).

The automobile was taken to Salt Lake City for repairs at Fred A. Carleson Company. The right side

was smashed and the right front wheel bent back. (R. 53, 87). The right front was repaired by Milo Solomon. He described the car as "pretty well bent up on the right front." (R. 87). In the course of repairing the front suspension system Solomon found a very small hole in the air line leading from the air reservoir tank to the manual override valve. (R. 104, Ex. P-2). He had to use soap suds on the line to locate the hole (R. 104) near the upper control arm. He was of the opinion that the control arm had rubbed a hole in the air line. (R. 92).

Plaintiffs' Statement of Facts is misleading regarding Solomon's testimony. (Brief of Appellant p. 6, 7). By implication Plaintiffs attempt to attribute to Solomon the status of an expert on the air suspension system of Pontiac automobiles. After reciting his experience as a mechanic, Plaintiffs state: "On no other Pontiac had Solomon ever seen the line so close to the control arm." (Id. p. 6). The same assertion is repeated later. (Id. p. 7). Such statement means absolutely nothing since Solomon testified that this was the only Pontiac air suspension system he had ever encountered. He testified:

> "Q. Over the time you have worked since they came out, since 1958, how many have you had occasion to work on?

A. I have never worked on one other than aligning, you have reference to aligning or working on one?

Q. Working on one.

A. I haven't worked on any other one, this is the only one I repaired.

Q. Before you undertook to repair this, did you receive instructions how to repair?

A. No sir." (R. 101).

Later Solomon said:

"Q. In connection with the front suspension your familiarity is, I take it, with the general location of the line?

A. Yes.

Q. And not with the precise position of where the lines are supposed to go according to the design of the General Motors engineers, that is correct, you are not familiar with that?

A. Well, from memory no, I couldn't tell you exactly where they should fit in." (R. 105).

On redirect examination, he said:

"Q. His question was a little broader, are you familiar with where those lines are located on other Pontiacs other than Leslie Price's?

A. Well, I have never looked at them if that will answer your question." (R. 107, 108).

Solomon acknowledged that in talking about the position of this line the space involved is less than an inch. (R. 109). In fact, counsel for Plaintiffs acknowledged that Solomon was not an expert when in arguing his motion to reopen, he stated:

> "At the time Mr. Solomon was on the witness stand it was revealed, and also by questions directed by the plaintiff to qualify him as an expert, he was not qualified as an expert. That this Pontiac was the only Pontiac he had ever worked on and this air suspension was the only one he had repaired on a Star Chief . . ." (R. 230).

After determining that Solomon was not qualified to testify as an expert, Plaintiffs called Stanley Renshaw, an employee of the Pontiac Motor Division of General Motors. Renshaw testfied that the suspension system was equipped with an exhaust line and that a hissing sound was normal in the car's operation when passengers got out of the car. (R. 196). With respect to the effect on the air pressure of a hole in the line, he said:

> "Q. Mr. Renshaw, are you telling us the air compressor operates to maintain a constant pressure into this tank and in this line?
>
> A. That is correct.
>
> Q. If you had a small hole the air compressor would stabilize even though there was some air leaking away?
>
> A. Yes." (R. 194).

If a car is down when the engine is stopped and then comes up within twenty seconds after starting of the engine, Renshaw stated that any hole in the system would necessarily be negligible in size. (R. 211).

Renshaw said that the front wheels were not regulated individually but that the T valve maintained a constant pressure between the two. (R. 197). The result of this is a leveling effect between the wheels. (R. 197). Even if all the air in the system were exhausted, the car would rest on compression bumpers and would still have road clearance. (R. 130, 209, 210).

Plaintiffs' Statement of Facts includes reference to proposed Exhibit P-3, a Pontiac Shop Manual. (Brief of Appellants, p. 8, 9). This material would seem to be improperly included in Plaintiffs' Brief since it appears from the record that proposed Exhibit P-3 was never admitted in evidence. (R. 21). The Court's ruling on this question is not entirely clear. At trial, counsel for Plaintiffs attempted to use the Manual for purposes of examination of Renshaw and was not permitted to do so. After resting their case, Plaintiffs moved to reopen, making a proffer of evidence that included reference to proposed Exhibit P-3. Regarding this, the Court said:

> "I think if the circumstances are such — whether or not counsel should be permitted the

right to reopen — that the Court should grant that right to reopen, and if the only question involved was whether or not there was material proffered and having relevancy, that the ruling of the Court would be, while somewhat remote, as much a part of the picture as much of the evidence that has been presented to explain how the system operates so inferences might be drawn what effect, if a failure, such a leak will have, — that will be of assistance to you, Mr. King. . . .

Do you want to dissect this? (refers to exhibit).

Mr. King: This is part of the record.

The Court: It is part of the record?

Mr. Hanson: It has not been received.

The Court: Is there any way to identify it?

Mr. King: I identified it by page.

Mr. Hanson: You said the motion was granted to each of the Defendants?

The Court: Yes." (R. 233, 234).

The Exhibit sheet indicates proposed Exhibit P-3 was not received in evidence. (R. 21).

If this exhibit was admitted in evidence by the Court, it was admitted erroneously. Page 3 A-33 of proposed Exhibit P-3, referred to by Plaintiffs, deals specifically with "Towing Air Suspension Car." (R. 229). The exhibit does not relate to any circumstances

present in this case. Counsel for Defendant General Motors Corporation objected to this exhibit on the ground it was irrelevant and immaterial and outside the issues of the case. (R. 231). It is obvious that the proposed exhibit has no tendency to illuminate any issue involved in this case.

After hearing Plaintiffs' proffer of evidence in support of their Motion to Reopen, the Court granted a Motion to Dismiss as to each Defendant.

STATEMENT OF POINTS

POINT I

PLAINTIFFS FAILED TO ESTABLISH THAT THE ALLEGED DEFECT IN THE AIR SUSPENSION SYSTEM, IF IT EXISTED, WAS CAUSED BY THE NEGLIGENCE OF DEFENDANT GENERAL MOTORS CORPORATION.

POINT II

THERE IS NO EVIDENCE THAT THE ALLEGED DEFECT IN THE AIR SUSPENSION SYSTEM CAUSED THE PLAINTIFFS' AUTOMOBILE TO LEAVE THE HIGHWAY AND OVERTURN.

ARGUMENT

POINT I

PLAINTIFFS FAILED TO ESTABLISH THAT THE ALLEGED DEFECT IN THE AIR SUSPENSION SYSTEM, IF

IT EXISTED, WAS CAUSED BY THE NEGLIGENCE OF DEFENDANT GENERAL MOTORS CORPORATION.

Plaintiffs claim that the air suspension system on the Price automobile was defective in that a line was installed in such a manner that the upper control arm rubbed against it causing a hole in the line from which the air in the system escaped. There is, of course, no direct evidence that the line was installed by General Motors in such a position that it was rubbed by the upper control arm.

Under the rule of *Hewitt* v. *General Tire and Rubber Co.*, 3 Utah 2d 354, 284 P.2d 471 (1955), Plaintiffs failed to establish that Defendant General Motors Corporation was negligent. To find a manufacturer negligent in the production of an instrumentality in which a defect subsequently appears, it must be proven either directly or by inference that the defect existed at the time the instrumentality left the manufacturer's control. To prove this by inference, the *Hewitt* case requires that the Plaintiff exclude every reasonable possibility except that the defect existed when it left the manufacturer's hand. To meet this burden a plaintiff must exclude every reasonable hypothesis that a third person may have caused the claimed defect.

It is obvious that Plaintiffs' evidence here does not exclude the reasonable possibility that the alleged defect

was caused by the work done at Ashby's. Indeed, it would appear to be more likely that the alleged defect was caused by Ashby's. Price admitted that after purchasing the automobile he took it to Ashby's on four different occasions to have the air suspension system worked on. (R. 80). This, of course, was before the accident and before the hole was discovered. There was evidence available regarding what was done at Ashby's, but Plaintiffs failed to produce the mechanic who worked on the car to testify whether or not he had changed the location of the air line with respect to the upper control arm. The name of this mechanic, Jay Fullmer, was known to Plaintiffs. (R. 66).

Any finding as to whose negligence caused the defect complained of here would have to be based upon one of at least two equally probable inferences, first, that the air line was placed too close to the upper control arm by General Motors, or, second, that Ashby's in working on the system placed the air line too close to the upper control arm. It was Plaintiffs' burden as to General Motors to exclude the inference that the alleged defect could have been caused by Ashby's. In failing to do this, Plaintiffs have failed to establish negligence on the part of Defendant General Motors under the *Hewitt* case.

Plaintiffs contend that the settling of the right front of the car is evidence of negligent placement of the air line. Such settling, however, is mechanically impossible under the evidence. Solomon testifed that he found a very small hole in the line between the reservoir tank and the manual override valve. (R. 89, 104, Ex. P-2). After the air leaves the reservoir tank it passes the point at which the hole was found and enters the manual override valve from which it is distributed to all four air springs. (R. 195, Ex. P-2). The air for the front air springs goes through a height control valve and a T valve (R. 195, Ex. P-2), the T valve maintaining constant pressure between the two front air springs. (R. 197, 198, 199). It is obvious from the explanation given by the expert witness Renshaw that a leak at the point claimed by Plaintiffs would not cause the right front of the body of the automobile to settle alone.

If this leak had existed prior to the accident, the result would have been that the entire body would have settled uniformly, since the available air would have been distributed equally to the wheels. The only reasonable inference that can be drawn from these facts is that the hole complained of had nothing whatever to do with the claimed settling of the right front.

POINT II

THERE IS NO EVIDENCE THAT THE ALLEGED DEFECT IN THE AIR SUSPENSION SYSTEM CAUSED THE PLAINTIFFS' AUTOMOBILE TO LEAVE THE HIGHWAY AND OVERTURN.

Plaintiffs failed as a matter of law to prove that the hole in the air line caused the Price automobile to leave the highway and overturn. Although the facts relating to this point are clear, Plaintiffs have attempted to formulate a theory that the air suspension system leaked, causing the body of the car to settle, causing a portion of the car to drag, throwing it off the highway. Plaintiffs' own testimony destroys this theory. Price testified:

> "Q. Relate what happened when you came near Delta?
>
> A. When we was making that turn, it happened so quick, it is kind of hard to explain. It seemed like the car stepped up and was off and over. (R. 46).
>
> * * * *
>
> Q. Will you tell how this felt to you immediately before you left the road and you turned over?
>
> A. I didn't have much of a chance to feel anything. In driving with power steering you sort of relax. I didn't have time to put much pressure on the wheel." (R. 47, 48).

Morley's testimony was similar. He said:

"Q. Tell what you observed, what the situation was, tell us what happened?

A. I noticed we was getting cose to home and all at once we just went upside down. I had time to say 'Oh, my God, Les.' That is all I got time to say.

Q. Mr. Morley, did you observe the way the automobile moved?

A. There wasn't time enough. It was so fast I didn't observe a thing. It just started going over and we was upside down and was out." (R. 136, 137).

He made no other observations regarding the operation of the automobile prior to the accident. (R. 155).

Neither Plaintiff testified that the car seemed to settle nor that any portion of the car dragged. On the contrary, Price testified:

"Q. When you left Delta the day of this accident, April 28, 1958, the level of that car was proper?

A. Yes sir.

Q. It stayed that way until *after* the accident?

A. Yes." (R. 82). (Emphasis added.)

Referring to the time immediately preceding the accident, Price said:

"Q. Do you recall immediately before the car going off the highway that the car was being rough riding?

A. No I didn't." (R. 76).

Morley confirmed the fact that the car was normal in its operation, saying:

"Q. Did you notice anything of an unusual nature about the automobile, or how it operated?

A. Not a thing." (R. 134).

Price admitted that while he was driving the car he had no trouble with the level of the body at all (R. 81, 82) and that the only time he had trouble with the level was after the car had been standing without the engine running for some considerable time. (R. 80).

Plaintiffs recalled clearly the events that occurred on the day of the accident. Certainly if the suspension system had failed and permitted the body of the car to drag in spite of the "compressor bumpers", they would have recalled this also. Plaintiffs rely heavily on a scuff mark on the highway to support their theory that a portion of the car dragged. Howover, again Plaintiffs' own statements are contrary to this theory. Price testified that upon returning to the scene of the accident the following day, he could see the brake marks on the

highway, but saw no gouges on the surface of the highway. (R. 51, 75). On cross-examination, Morley admitted that the scuff mark he saw was completely off the surface of the highway. (R. 151).

The record affirmatively shows that no dragging occurred until after the automobile left the highway. This record cannot possibly support a finding that the cause of the accident was a dragging of the car on the highway caused by a failure of the air suspension system. On the contrary, Renshaw's testimony that a small hole in the air line would be compensated for by the air compressor and would not affect the operation of the system (R. 194) and Solomon's characterization of the hole as "very small" (R. 104, 92, 89) requiring the use of soap suds to locate it (R. 104) negate Plaintiffs' contention that the hole was so large that it dissipated the air from the system.

Utah law is clear on the question of causation. The cases of *Hooper* v. *General Motors Corporation,* 123 Utah 515, 260 P.2d 549, (1953), *Northern* v. *General Motors Corporation,* 2 Utah 2d 9, 268 P.2d 981, (1954), and *Hewitt* v. *General Tire and Rubber Co.,* 3 Utah 2d 354, 284 P.2d 471, (1955), all stand for the principle that to prevail a plaintiff must show that the defect complained of caused the damage. Here there is abso-

lutely no evidence that the hole complained of had any causal relation to the accident.

CONCLUSION

Although the trend of modern decisions facilitates proof of claims, the necessity of some evidence in support of the claim asserted is still a part of our law. Until proof of negligence and causation becomes merely an unnecessary obstacle to an award of damages and liability rests on injury alone, cases such as this cannot properly be submitted to juries.

The trial court in dismissing this action at the end of the Plaintiffs' case acted in the only way possible under the evidence and the lack thereof. Its judgment should, therefore, be affirmed.

Respectfully submitted,

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